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In the Supreme Court of the United States

OCTOBER TERM, 1941

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,
PETITIONER,

v.

CEMENT INVESTORS, INC., RESPONDENT.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.**

BRIEF FOR THE RESPONDENT IN OPPOSITION

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BRIEF FOR THE RESPONDENT IN OPPOSITION

The Respondent taxpayer opposes the granting of the Petition for Writ of Certiorari herein and prays that the Writ be denied.

OPINIONS BELOW.

The memorandum opinion of the United States Board of Tax Appeals (R. 13-22) is unpublished. The opinion of the Circuit Court of Appeals (R. 194-200) is reported in 122 F. 2d 380.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered July 24, 1941 (R. 200). The Government has invoked the jurisdiction of this Court under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. The Respondent taxpayer urges this Court not to assume jurisdiction, in that the case is not a proper one for review on Writ of Certiorari under Rule 38 of this Court.

QUESTION PRESENTED.

Where a taxpayer exchanged defaulted bonds of The Colorado Industrial Company, guaranteed by The Colorado Fuel and Iron Company, and the equities represented thereby, for bonds and stock of a new company, The Colorado Fuel and Iron Corporation, which acquired all of the assets of the predecessor companies, and immediately after such exchange the taxpayer and the other former bondholders of The Colorado Industrial Company owned all of the outstanding stock of the new company, was taxable gain realized? The Circuit Court of Appeals for the Tenth Circuit unanimously held that no gain was realized, because the exchange came within the provisions of Section 112 (b) (5) of the Revenue Act of 1936 (R. 197-199, 200). Two of the three judges before whom the case was argued held, moreover, that the transaction was nontaxable as a "reorganization" under Sections 112 (b) (3) and 112 (g) (1) of the Revenue Act of 1936 (R. 199-200).

REASONS FOR DENYING THE WRIT.

The Petition for Writ of Certiorari has distorted the holding of the Court below. It asserts (P. 2, 6) that the primary holding of the Court below concerned "reorganization", and urges this Court to assume jurisdiction because of a conflict between the circuits on this issue. On the contrary, the holding of the Court below was not based on the question of "reorganization". No essential conflict exists between the decision in this case and any decisions in other circuits.

The Tenth Circuit Court of Appeals in the case at bar held that the exchange by the Taxpayer of bonds of The Colorado Industrial Company for income bonds and stock in the new Colorado Fuel and Iron Corporation was a nontaxable transaction under the terms of Section 112 (b) (5)

of the Revenue Act of 1936¹ (R. 197-199). That Section provides that no gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities and immediately after the exchange such person or persons are in control of the corporation. The Court held that under the findings of the District Court in the reorganization proceedings, the Industrial bondholders had acquired all the equity in the old Colorado Fuel and Iron Company prior to the date of exchange; that, therefore, "in substance, Industrial's bondholders were the transferors" (R. 198). It held further that "the bonds of Industrial were property in the hands of the holders thereof and they were transferred to the Colorado Corporation in exchange for all of the voting stock thereof." (R. 198) "Hence", the Court concluded, "property was transferred to the Colorado Corporation solely in exchange for stock and securities of such corporation and immediately after the transfer the bondholders, the transferors, were in control of the Colorado Corporation, owning all of its stock, and no gain or loss should be recognized by reason of the provisions of §112 (b) (5)". (R. 198-199)

Such holding that no gain was realized by virtue of the provisions of Section 112 (b) (5) was unanimous, for Judge Huxman concurred specially in it (R. 200). Such holding is entirely independent of the question of "reorganization". As the Court said, "Under §112 (b) (5), a reorganization is not an essential element".² (R. 198) The

¹ "Transfer to Corporation Controlled by Transferor.—No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; but in the case of an exchange by two or more persons this paragraph shall apply only if the amount of the stock and securities received by each is substantially in proportion to his interest in the property prior to the exchange."

² *Portland Oil Company v. Commissioner*, (C. C. A. 1), 109 F. 2d 479, 489, certiorari denied 310 U. S. 650; *Hartford-Empire Company v. Commissioner*, 43 B. T. A. No. 20; *Leckie v. Commissioner*, 37 B. T. A. 252, 257; *Handbird Holding Corporation v. Commissioner*, 32 B. T. A. 238, 247.

LeTulle case³, which concerned an asserted reorganization, has no bearing whatsoever on this issue, and this issue involves no conflict with any other circuit.⁴

The decision under Section 112 (b) (5), moreover, involves no question of general importance justifying certiorari by the Supreme Court of the United States. Indeed, on the basis of the Government's efforts below it can hardly be said to raise any question at all. The language of Section 112 (b) (5) has occurred in all revenue acts since 1924. In the briefs below the Counsel for Commissioner have cited no cases whatsoever holding it inapplicable to a transaction of this kind. Nor has the Government advanced any argument on the point other than categorical statements. Counsel even failed to file a reply brief with argument and authority on this question when the Circuit Court granted it special leave to do so. (R. 194) Nor has Respondent discovered any cases holding Section 112 (b) (5) inapplicable to a transaction of this sort. On the other hand, the position of the Circuit Court of Appeals for the Tenth Circuit in the proceedings below was supported by the following authorities: *Léckie v. Commissioner*, 37 B. T. A. 252, 257; *Rockford Brick & Tile Co. v. Commissioner*, 31 B. T. A. 537; *Miller & Paine v. Commissioner*, 42 B. T. A. 586; *Portland Oil Company v. Commissioner*, (C. C. A. 1) 109 F. 2d 479, 488, certiorari denied 310 U. S. 650; *P. A. Birren & Son v. Commissioner*, (C. C. A. 7) 116 F. 2d 718, 719.

The holding below on which the Government bases its Petition for Certiorari, that the transaction also constituted a reorganization, was secondary, unnecessary and immaterial. The Supreme Court of the United States could resolve this question either way without affecting the decision of this case.

³ *LeTulle v. Scofield*, 308 U. S. 415.

⁴ The only other circuit court decisions which Respondent has discovered on the question, *Portland Oil Company v. Commissioner*, (C. C. A. 1) 109 F. 2d 479, certiorari denied 310 U. S. 650 and *P. A. Birren & Son v. Commissioner*, (C. C. A. 7) 116 F. 2d 718; held in accord with the case at bar that the transfer of intangibles (in one case an installment contract and in the other accounts receivable) to a corporation in exchange for its stock was covered by Section 112 (b) (5).

CONCLUSION.

It is, therefore, respectfully submitted that the Government's Petition for Certiorari should be denied.

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